Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BEN EZRA, WEINSTEIN, AND COMPANY, INC.,

Petitioner,

v.

AMERICA ONLINE INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals misconstrued and misapplied the immunity provision of the Communications Decency Act of 1996, 47 U.S.C. § 230, in holding a commercial internet service provider – heavily involved with the content provider in the process of getting commercial data prepared for transmission to customers – immune from Petitioner's suit for damages for the erroneous publication of Petitioner's stock price and share volume on the commercial site of the service provider.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Ben Ezra, Weinstein, and Company, Inc., has no parent company or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ben Ezra, Weinstein, and Company, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reprinted in the Appendix (App. 1-14) is published at 206 F.3d 980. The district court's memorandum opinion and order, reprinted in the Appendix (App. 15-23), and its final judgment, also reprinted in the Appendix (App. 24) are both unreported.

JURISDICTION

The court of appeals filed its opinion and order on March 14, 2000. (App. 1) Jurisdiction is invoked under 28 U.S.C. § 1254(1). Pursuant to Sup. Ct. R. 13 and 28 U.S.C. § 2101(c), this petition is timely filed on or before June 12, 2000.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Section 509 of the Communications Decency Act of 1996,

Pub. L. No. 104-104, 110 Stat. 137-39 (codified at 47 U.S.C. § 230), which provides in relevant parts:

> (c)(1) No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (e)(3) Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.
>
> (f)(2) The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet. . . .
>
> (f)(3) The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

STATEMENT OF THE CASE

Petitioner, Ben Ezra, Weinstein, and Company (Ben Ezra), sued America Online (AOL) in March 1997 in the District Court of Bernalillo County, New Mexico. Ben

Ezra alleged state law claims of defamation and negligence, arising from AOL's publication of erroneous information concerning Ben Ezra stock on the "Quotes and Portfolios" area of AOL's internet service. AOL removed the case to federal court on diversity grounds. After limited discovery, the district court granted AOL's motion for summary judgment, holding that AOL was immune from such suit under the immunity provision of the Communications Decency Act, 47 U.S.C. § 230. The court of appeals affirmed.

A. The Parties and the Underlying Conduct Giving Rise to the Litigation

Ben Ezra designs and manufactures corporate finance computer software. Its stock is publicly traded as an over-the-counter (OTC) stock. AOL is an interactive computer service, which among other things, publishes stock quotation information – i.e., prices and volume of traded shares of stock – on the "Quotes and Portfolios" area of its internet service. Only AOL subscribers may access and use this information.

Ben Ezra first listed its stock on the OTC market in December 1996, and soon thereafter AOL began publishing Ben Ezra stock prices and volume on the "Quotes & Portfolios" area of AOL's service. C.A. Aplt. App. at 16. In late 1996 and early 1997 AOL became aware that it had published erroneous OTC stock information concerning other companies – errors which understated stock prices by a factor of 10 or 10,000. *Id.* at 82-84.

On or about March 4, 1997, AOL published incorrect information about Ben Ezra stock in its "Quotes & Portfolios" area. AOL reported Ben Ezra stock as closing at $0.17 per share on a volume of 1.3 million shares traded, when the correct figure was $1.84 per share on a volume of 30,500 shares traded. *Id.* at 16-18. Ben Ezra informed AOL of the error the following day, *id.* at 18-19, and discovered that although AOL knew of the error, it did not take corrective action or inform the millions of its subscribers that the error had occurred. *Id.* at 22-23.

B. The Proceedings Below, and the Facts Relevant to the Issue Presented

Ben Ezra's amended complaint in federal court alleged that on three occasions AOL defamed Ben Ezra by publishing inaccurate information, and failed to exercise reasonable care in the manipulation, alteration and change of the stock information.[1] Ben Ezra asserted that the March 4th publication error caused a panic-sell off, driving down the price of its stock, *id.* at 16-18, and that the subsequent errors also damaged the value of its stock. *Id.* at 18-19.

AOL answered the amended complaint, and moved for summary judgment on the ground that the Communications Decency Act, 47 U.S.C. § 230 conferred immunity on AOL for such suits. Ben Ezra filed a cross-motion for partial summary judgment on the immunity question,

---

[1] In addition to the March 1997 publication, AOL also published erroneous reports of Ben Ezra's stock in August 1997 and April 1998. C.A. Aplt. App. at 18-19.

and sought discovery on that issue. The magistrate judge allowed Ben Ezra limited discovery on the immunity question. The matter then came before the district court on AOL's motion for summary judgment.[2]

In support of its summary judgment motion AOL asserted that all of the Ben Ezra stock information made available to its customers is provided by two other entities – ComStock and Townsend. It was undisputed that ComStock collects stock trading activity through various exchanges and markets and electronically transmits that data to AOL – via the so-called ComStock Data Stream. It was also undisputed that Townsend provides software which decodes the ComStock Data Stream and transforms it into an electronic database of price, volume and other information organized by individual stock – the so-called ComStock/Townsend Database. AOL asserted that the stock quotation information made available through its "Quotes & Portfolios" area was taken directly and without substantive alteration from the ComStock/Townsend Database.

AOL claimed that as an interactive computer service, and not an information content provider it was immune under § 230 based on two theories. First, AOL claimed that as an interactive computer service it is *absolutely immune* with respect to any and all information it provides to its customers whenever it receives information from "another information provider," irrespective of

---

[2] There were other procedural errors raised below, but those procedural questions are not at issue in the instant petition.

whether AOL itself participates in the "creation or development" of that information. *See* C.A. Brief of Appellee at 36 n.4. Second, and more narrowly, AOL asserted *qualified immunity* from this lawsuit because the stock quote information was provided to AOL by other information providers, and that AOL played no role in the "creation or development" of that information. *See id.* at 36-37.

In opposition to AOL's immunity defense, Ben Ezra contended that summary judgment should be granted to it on that issue, or, in the alternative, that AOL's motion should be denied because of disputed issues of fact that needed to be resolved. *See* C.A. Brief-in-Chief at 11. Ben Ezra contended that AOL's claim of absolute immunity – asserted to apply whenever information is provided to it by another information provider – was an untenable construction of § 230(c)(1), wholly inconsistent with Congress' purpose, and unsupported by the relevant case law. C.A. Aplt. Sealed App. (Plaintiff's Supp. Memo in Opposition to Summary Judgment at 11-13). With respect to AOL's claim of qualified immunity, Ben Ezra asserted that there was sufficient evidence to at least create a genuine issue of material fact as to whether AOL was "responsible, in whole or in part, for the creation or development" of the Ben Ezra stock information "provided through the Internet" to its customers within the meaning of § 230(f)(3). *See id.* at 13; C.A. Brief-in-Chief at 18-29. In support of that claim, Ben Ezra provided the following constellation of evidence, most of which was undisputed:

1. The so-called ComStock computers which receive and temporarily hold the stock quotation data obtained from the stock

exchanges, are housed at AOL, and AOL pays all extraordinary costs for repair and replacement of these computers. Aplt. App. at 151-188, Aplt. Sealed App. at 32-37;

2. The software provided by Townsend was first installed on the ComStock computers by AOL staff, without testing the software, although later communications between AOL and ComStock resulted in AOL staff testing the software on installation. Aplt. Sealed App. at 82-95;

3. Even before the errors occurred regarding Ben Ezra stock, there was a flurry of e-mails among ComStock, Townsend and AOL about errors in OTC stocks on the "Quotes & Portfolios" area, and a pattern of cooperative effort among Comstock, Townsend and AOL to correct the reporting, including some alteration of the software by AOL. *Id.* at 39-40, 41-53, 81.

4. The senior AOL software engineer wrote code for AOL which enabled the "Quotes & Portfolios" server, owned by AOL, to communicate with the ComStock computers located at AOL and partially maintained by AOL, and enabled the distribution of the stock information to AOL subscribers. *Id.* at 76-76, 88-89;

5. The AOL software was used in "formatting of the information retrieved from the ComStock/Townsend Database." *Id.* at 30-32;

6. The ComStock computers housed at AOL were used by AOL to develop the pages that are accessible to AOL subscribers. Plaintiff's Supp. Memo at 5-6;

Based on the foregoing information, (alleged in even more detail in the trial court), Ben Ezra asserted that there was a sufficiently disputed factual issue on whether AOL does more than pass along the stock quotation data from the ComStock Data Stream. Ben Ezra asserted that this evidence showed the kind of cooperative venture among the three parties such that AOL is "responsible . . . in part," along with ComStock and Townsend, "for the . . . development of information provided through the Internet," § 230(f)(3), and, is, therefore, not immune from this suit.

The district court determined the matter on the written record, without an evidentiary hearing, and granted AOL's summary judgment motion, holding that AOL was immune under § 230. Ignoring much of the foregoing evidence, the district court concluded that "there is no evidence in the record which contradicts the AOL declarant's statements that all of the allegedly defamatory information was created 'in whole or in part' by the third-party 'information content providers' ComStock and Townsend." App. at 20. Apparently adopting AOL's absolute immunity claim, the district court reasoned that "Section 230 . . . immunizes computer services providers like AOL from liability for information that originates with third parties." *Id.* (*quoting Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997)). In addition, the district court concluded that AOL's housing of the Comstock computers only facilitated making the data available to its customers, App. at 20 n.1, and that § 230 immunity attaches even with respect to an information service provider which has an "active, [or] aggressive role in making available content provided by others."

App. at 21. (*quoting Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D.D.C. 1998).

On appeal, the court of appeals noted that AOL abandoned its claim of absolute immunity and acknowledged that as an interactive computer service its activities could fall outside the § 230 immunity "by participating in the creation or development of information." *See* App. 8 n.4. The court of appeals, however, affirmed the district court dismissal, concluding that "Plaintiff has not demonstrated Defendant worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that Defendant became an information content provider." *Id.* at 8. In doing so, the court of appeals focused only on the interplay among the AOL, ComStock and Townsend with respect to the correction of errors, and ignored the other information presented by Ben Ezra concerning AOL's relationship with the other two firms, demonstrating AOL's substantial participation in developing the stock data in a form necessary to present to its customers.[3]

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[3] Given that appellate counsel for AOL argued the very facts developed in its brief, *see* C.A. Brief-in-Chief at 11-17, the court of appeals was patently in error when it stated that at oral argument "Plaintiff could not identify any evidence indicating Defendant developed or created the stock quotation information." App. at 9 n.5.

REASON FOR GRANTING THE WRIT

IN UPHOLDING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AND DISMISSAL OF PETITIONER'S COMPLAINT, THE TENTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This case presents an important federal law question concerning the proper interpretation of the immunity provision of the Communications Decency Act of 1996. That Act states that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1). Thus, an "interactive computer service" which provides no information of its own, but merely provides access services to its customers, is immune from suit for what the content providers who use that service may publish. Also, a content provider, who publishes its information through the use of a service provider remains fully liable for its publications, and is not immune under the Act.

But the Act recognizes that an internet service provider can also be an "information content provider" not subject to the immunity provided by § 230(c)(1) when it defines a content provider as "any person or entity that is *responsible, in whole or in part, for the creation or development of information provided through the Internet* or any other interactive computer service." *Id.* at § 230(f)(3) (emphasis added). Furthermore, as recognized by both AOL and the court of appeals, an interactive computer service is not immune under § 230 "with respect to information . . . [the service] developed or created by itself." App. at 8 n.4.

Indeed, and directly at issue here, both AOL and the court of appeals also recognized that:

> in an appropriate situation, an interactive computer service could also act as an information content provider *by participating in the creation or development of information*, and thus not qualify for § 230 immunity.

Id. (emphasis added.) Thus, this case presents the question of how the lower courts should determine when and under what circumstances an "interactive computer service" crosses the line to fall outside the protection of § 230 with respect to its participatory activity with an information content provider. Both lower courts mishandled this question, and they did so in a way, which if it is allowed to continue, will prevent the resolution of this important question. In addition, there are compelling reasons why this Court should decide this question now, and in this case.

A. The Lower Courts Not Only Erred in its Summary Judgment Conclusion, But Did So In A Way Which Could Prevent Substantive Review of the Important Question Presented

Both the district court and the court of appeals erred in their summary judgment rulings, and they did so by ignoring the substantial evidence presented by Ben Ezra on the essential factual question of the quantum of proof needed to establish sufficient participation by a service provider with a content provider to develop data for publication, thus bringing its conduct outside the purview of § 230 immunity. The district court focused on the

origination of the information with third parties as determinative, *see* App. at 20, and then only noted that the presence of the ComStock computers within AOL was not sufficient evidence of data development on AOL's part.

The court of appeals implicitly rejected any hint of absolute immunity, and acknowledged that a close working relationship between a service provider and content provider could remove the service provider from the protection of § 230 immunity. The court of appeals, however, then categorically and erroneously concluded that "Plaintiff could not identify any evidence" in support of its claim. App. at 9 n.5.

Both approaches are fundamentally flawed. The district court misfocused the inquiry on the origination of the data, and although the court of appeals acknowledged the importance of collaborative efforts between the service provider and the information provider, it focused almost exclusively on the collaborative efforts at data error correction after the fact, thereby ignoring the other important evidence presented by Ben Ezra. The result of both erroneous approaches was to create a virtual irrebuttable presumption of immunity which, if allowed to stand, would be almost impossible to overcome.

Such a presumption might be appropriate with respect to internet service providers which steer clear of information providing altogether. It has no place, however, with respect to service providers like AOL, which perform all three functions – providing internet services to others, providing a good deal of their own information

on the Internet, and working with other information providers to jointly present commercial data of interest to its customers.

The settled case law regarding § 230 involve much different circumstances. Nonetheless, the analysis in those cases suggests why this Court must undertake a narrower reading of the statute than did the lower courts here, when the statute is applied to internet provider services like AOL which engage in a collaborative process with information providers to get complex data to AOL customers. *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998), for example, involved an unknown third party who posted the defamatory messages. Section 230 immunity must apply in that case, since there could be no collaborative involvement of AOL with the unknown third party. *See, e.g., Doe v. America Online*, 1997 WL 374223 (Fla. Cir. Ct. 1997), *aff'd*, 718 So. 2d 385 (Fla. Dist. Ct. App. 1998) (AOL immune when third party advertised material in an AOL chat room); *Aquino v. Electriciti, Inc.*, 26 Med. L. Rep. (BNA) 1032 (Cal Super. Ct. 1997) (anonymous posting of the offensive material); *see also, Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (§ 230 immunity attaches to AOL when plaintiff conceded that Drudge, and not AOL edited, checked and verified the information in his report posted on AOL.)

Here, on the other hand, there is a pattern of collaborative effort – among AOL, Comstock, and Townsend – working together to present timely and accurate commercial data in competition with other stock quotation services. The evidence of that collaborative venture – from placing the computers storing the data stream at AOL, to

AOL engineers working on those machines, to AOL engineers manipulating Townsend software, and writing its own software to coordinate, collect, accurately reflect, and transmit that data – distinguishes this case, and defeats the right to summary judgment on the § 230 immunity question.

Indeed, denying immunity on summary judgment in this case is thoroughly consistent with the policies underlying the Communications Decency Act of 1996. Section 230 was intended to protect mere carriers of information. 141 Cong. Rec. H8470-71 (1995) (act will protect those who provide "front end to the Internet," criticizing earlier Senate bill because it would have made a mailman who delivers a plain brown envelope liable for what is inside the envelope). The statute, however, was not intended to protect a service provider who has taken on, in conjunction with the information provider, responsibility for the content and the format of the message being delivered. *See Blumenthal*, 992 at 50 ("[s]ection 230 does not preclude joint liability for the joint development of content. . . . "); *Zeran*, 958 F. Supp. at 1133-34 n.20 (information initially placed online by third party may be considered information provided by a service provider, thereby rendering § 230(c) inapplicable).

Here, the evidence is sufficient to establish that with regards to the "Quotes and Portfolios" portion of its services, AOL acts as much more than a mailman. Rather, AOL has joined forces with ComStock and Townsend to gather, format, and present data which they all receive from other sources, but which together they manipulate and format in very special ways to compete with others in getting that information to the customers of AOL.

Accordingly, AOL's activities here do not fall within the scope of immunity granted by § 230(c)(1), and, in any event, the evidence presented precludes summary judgment on that issue.

B. There Are Good And Sufficient Reasons Why This Court Should Take Up The Question Presented And Resolve It Here And Now

This Court has refused certiorari review to await further development of the law in the lower courts. *See, Gillard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J. dissenting from the denial of certiorari) (disagreeing with colleagues who "believe that this Court should postpone consideration of the issue until more . . . federal circuits have experimented with the substantive and procedural solutions to the problem. . . . ") With respect to issues of federal law, the Court also often defers review until a conflict in the circuits develops. *See* Sup. Ct. R. 10(a). There are, however, compelling reasons why this Court should decide this important question now and in this case, without awaiting further lower court development or a conflict in the circuits to develop.

First, there is a virtual rush toward more and more service provider/content provider cooperative conduct in the Internet world. That development is evidenced by AOL's own pending merger with a major media conglomerate. *See America Online And Time Warner Will Merge To Create World's First Internet-Age Media And Communications Company*, Time-Warner News Release, Jan 10, 2000. As that development takes shape, there will be more instances of harm to individuals and businesses caused

by such activities – which fall well outside the intent of Congress in enacting § 230(c). A resolution by this Court of the question presented here and now will provide the kind of guidance which both injured parties and Internet conglomerates deserve as these new arrangements take shape.

Second, resolution now will also provide helpful guidance to the lower courts. This is not the kind of case which suggests that there may be a multiplicity of ways of resolving the matter, thus cautioning delay to allow the lower courts to experiment with those various alternatives. Rather, a decision now will prevent the proliferation of unnecessary litigation and the waste of judicial resources.

Third, resolution now can help focus the attention of Congress on the problem, should Congress wish to resolve the question differently from this Court. A host of lower court cases, which duck the clear legal issue by resolving summary judgment cases by granting summary judgment and failing to come to grips with the factual disputes which are presented – as the lower courts did in this case – would merely allow the question to go unanswered in a way which would hardly focus the attention of Congress on this matter.

Thus, resolution here and now of this important federal law question will benefit litigants and courts alike. It would settle a matter of growing importance to the growing confluence of the service and content provider world of the Internet, and would focus the attention of Congress on the issue.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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June, 2000

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-2068

BEN EZRA, WEINSTEIN, AND COMPANY, INC.,

Plaintiff-Appellant,

v.

AMERICA ONLINE INCORPORATED,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(D.C. No. CIV-97-485-LH/LFG)

(Filed Mar. 14, 2000)

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Before **BALDOCK, BRORBY**, and **LUCERO**, Circuit Judges.

BALDOCK, Circuit Judge.

Section 509 of the Communications Decency Privacy Act of 1996, Pub.L. No. 104-104, 110 Stat. 137-39 (codified at 47 U.S.C. § 230), provides in relevant part: "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The principal issue in this case is whether America Online acted as an information content provider outside the scope of § 230 immunity when it provided access to allegedly inaccurate information regarding Ben Ezra, Weinstein, and Company's publicly traded stock. We hold that America Online acted solely as an interactive computer service provider and therefore is immune from suit under § 230.

I.

Defendant America Online Incorporated operates a large interactive computer service, through which millions of subscribers can access various information and information services, including the Internet. Through its Quotes & Portfolios service area, Defendant publishes continuously updated stock quotation information concerning more than 40,000 publicly traded stocks and securities. The stock quotation information includes data about the market price for specific stocks and the volume of shares traded in the current or previous trading day. Two independent third parties – S & P ComStock, Inc., a stock quote provider, and Townsend Analytics, Ltd., a

software provider designated by ComStock – jointly provide this information to Defendant. The original sources for this information are major national and international stock exchanges and stock markets, including the New York Stock Exchange, the American Stock Exchange, and the Over-the-Counter market.

Plaintiff Ben Ezra, Weinstein, and Company, an Albuquerque-based, publicly owned company, designs and manufactures corporate finance computer software. In March 1997, Plaintiff filed an action in New Mexico state court against Defendant asserting state law claims for defamation and negligence. In its complaint, Plaintiff sought both damages and injunctive relief. Plaintiff alleged that on three occasions Defendant published incorrect information concerning Plaintiff's stock price and share volume. Plaintiff claimed Defendant defamed Plaintiff by publishing the allegedly inaccurate information. Plaintiff also claimed Defendant failed to exercise reasonable care in the manipulation, alteration, and change of the stock information.

Defendant removed the action to federal court on the basis of diversity of citizenship. *See* 28 U.S.C. §§ 1332 & 1441. After answering Plaintiff's amended complaint, Defendant moved for summary judgment on the ground that the Communications Decency Act, 47 U.S.C. § 230, provided Defendant with immunity from Plaintiff's suit. *See* Fed. R. Civ. P. 56. Defendant also filed a motion to stay discovery pending resolution of its summary judgment motion. Plaintiff filed a cross-motion for summary judgment.

Plaintiff also filed a motion pursuant to Fed. R. Civ. P. 56(f) seeking authorization to conduct discovery.[1]

A magistrate judge granted Plaintiff a continuance and permitted it to inquire into five factual topics relating to whether Defendant qualified for § 230 immunity.[2] The magistrate judge allowed Plaintiff to serve twenty-five interrogatories and take four depositions on those five

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[1] Fed. R. Civ. P. 56(f) provides,

> Should it appear from the affidavits of a party opposing the [summary judgement] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[2] Those five topics were:

> (1) Whether a problem(s) with the interconnected personal computers owned and used by Defendant altered or manipulated the securities information from ComStock;
>
> (2) How the ComStock machines and Defendant's personal computers interact;
>
> (3) The alterations Defendant makes to the stock data it takes from the ComStock/Townsend Database. The alterations Defendant believes are substantive;
>
> (4) How the errors in Plaintiff's stock information actually occurred;
>
> (5) Whether computer software created by Defendant "to perform the task of displaying particular information contained in the ComStock/Townsend Database" caused or allowed the erroneous reporting of Plaintiff's stock information.

topics. After conducting discovery pursuant to the magistrate judge's order, Plaintiff sought permission to conduct additional discovery. The magistrate judge denied the motion, finding that Plaintiff's request exceeded the originally authorized discovery and that Plaintiff failed to demonstrate the previously authorized depositions or written discovery were insufficient to respond to Defendant's summary judgment motion. Plaintiff appealed the magistrate judge's order to the district court. Plaintiff also moved for leave to amend its complaint to join ComStock and Townsend as defendants to its action. Finally, Plaintiff moved to stay proceedings against Defendant to allow it to take discovery from ComStock and Townsend.

The district court granted Defendant's motion for summary judgment and denied Plaintiff's cross-motion for summary judgment. The district court concluded that the undisputed evidence established Defendant never produced or created any of the allegedly inaccurate information. Consequently, the district court held that § 230 required dismissal of all Plaintiff's claims. In addition, the district court denied as moot Plaintiff's motions to stay proceedings and join additional defendants. Finally, the district court overruled Plaintiff's objection to the magistrate judge's order denying leave to take further discovery. Plaintiff appeals.

On appeal, Plaintiff argues the district court (1) erred in concluding that Defendant was immune from suit under § 230 as a matter of law, (2) abused its discretion in overruling Plaintiff's objection to the magistrate judge's order denying it leave to take additional discovery, and (3) abused its discretion in denying Plaintiff's motions to

stay proceedings and for leave to amend the complaint to join additional defendants. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

II.

Plaintiff argues Defendant is not immune from suit under 47 U.S.C. § 230 because Defendant acts as both an interactive computer service and an information content provider by participating in the creation and development of the stock quotation information. The district court, however, concluded that Defendant qualified for statutory immunity pursuant to § 230. First, the district court noted that Plaintiff did not dispute that Defendant was an "interactive computer service" as defined by § 230. Further, the district court found no evidence in the record that Defendant provided *any* of the stock quote information at issue. Consequently, the district court granted Defendant's motion for summary judgment.

We review the grant of summary judgment de novo, applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c). *United States v. Hess*, 194 F.3d 1164, 1170 (10th Cir. 1999). We also review de novo the district court's interpretation of a federal statute. *Id.* In construing a federal statute, we " 'give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.' " *Id.* (quoting *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993)).

47 U.S.C. § 230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a

third party. *See id.* § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). Specifically, § 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet. . . . " Finally, § 230(f)(3) defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[3]

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[3] Congress enacted § 230 to promote freedom of speech in the "new and burgeoning Internet medium" by eliminating the "threat [of] tort-based lawsuits" against interactive services for injury caused by "the communications of others." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). "The Internet is a unique and wholly new medium of worldwide human communication," which "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (internal quotation and citation omitted). In enacting § 230, Congress specifically found that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). Congress further stated, "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* at § 230(b)(2).

Plaintiff does not dispute that Defendant clearly fits within the definition of "interactive computer service" and that ComStock and Townsend are "information content providers" as defined by § 230(f). Plaintiff argues, however, that Defendant worked so closely with ComStock and Townsend in the creation and development of the stock quotation information that it also operated as an "information content provider." Defendant, on the other hand, claims it played no role in the creation or development of the stock quotation information.[4]

We believe Plaintiff has not demonstrated Defendant worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that Defendant became an information content provider. While Defendant did communicate with ComStock and Townsend each time errors in the stock information came to its attention, such communications simply do not constitute the development or creation of the stock quotation information. Rather, the evidence Plaintiff presented indicated that the communications consisted of e-mails from

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[4] Defendant initially argued it was entitled to absolute immunity as an interactive computer service. At oral argument, however, Defendant conceded that § 230 would not immunize Defendant with respect to information Defendant developed or created by itself. In addition, Defendant conceded that in an appropriate situation, an interactive computer service could also act as an information content provider by participating in the creation or development of information, and thus not qualify for § 230 immunity.

Defendant requesting ComStock correct the allegedly inaccurate information.[5]

Plaintiff argues that Defendant deleted some stock symbols or other information from the data base in an effort to correct the errors. Plaintiff further argues that such alteration of information constitutes "creation or development" of information and transforms Defendant into an "information content provider." By deleting the symbols, however, Defendant simply made the data unavailable and did not develop or create the stock quotation information displayed.

Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions. *See Zeran v. America Online*, 129 F.3d, 327, 331 (4th Cir. 1997) (in enacting § 230, Congress sought "to encourage service providers to self-regulate the dissemination of offensive material over their services" and to remove disincentives to self-regulation); *Blumenthal v. Drudge*, 922 F. Supp. 44, 52 (D.D.C. 1998) (§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions); 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Barton) (Congress enacted § 230 to give interactive service providers "a reasonable way to . . . help them self-regulate themselves without penalty of law"). By deleting the allegedly inaccurate stock quotation information, Defendant was

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[5] At oral argument, the court continually asked Plaintiff what evidence the record contained to support her argument. Plaintiff could not identify any evidence indicating Defendant developed or created the stock quotation information.

simply engaging in the editorial functions Congress sought to protect.

Plaintiff presents no evidence to contradict Defendant's evidence that ComStock and Townsend alone created the stock information at issue. Moreover, Plaintiff presents no evidence to suggest that Defendant was "responsible, in whole or in part, for in [sic] the creation and development of information" published on its Quotes & Portfolios area. *See* 47 U.S.C. § 239(f)(3). In fact, the contract between Defendant and ComStock specifically provided that "AOL may not modify, revise, or change" the information which ComStock provided.

Imposing liability on Defendant for the allegedly inaccurate stock information provided by ComStock would "treat" Defendant as the "publisher or speaker," a result § 230 specifically proscribes. In this regard, we agree with the Fourth Circuit's decision in *Zeran*, 129 F.3d at 327. There, the Fourth Circuit held § 230 barred a plaintiff's suit seeking to hold AOL liable for defamatory speech initiated by a third party. *Id.* at 330 ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party. . . . "). Accordingly, the district court in this case correctly concluded Defendant is immune from suit pursuant to § 230 and properly granted Defendant's motion for summary judgment.

III.

Plaintiff next argues that the district court abused its discretion in overruling its objection to the magistrate

judge's order denying Plaintiff additional discovery. Specifically, Plaintiff claims that the magistrate judge exceeded his authority under 28 U.S.C. § 636(b)(1)(A), which precludes magistrate judges from ruling on dispositive motions such as motions for summary judgment. Because the magistrate judge, in the course of its discovery ruling, noted that § 230 gives online service providers some protection from discovery burdens, Plaintiff argues the magistrate judge effectively ruled on the summary judgment motion. We review a district court's denial of a motion for further discovery for abuse of discretion. *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1010 (10th Cir. 1999).

Contrary to Plaintiff's argument, the magistrate judge did not rule on Defendant's summary judgment. The magistrate judge simply concluded that "[t]o allow *further* discovery *beyond* that already authorized by the Court would deny an interactive service provider the immunity authorized by the Communications Decency Act." (emphasis added). The district court, not the magistrate judge, subsequently ruled on Defendant's summary judgment motion. Accordingly, the magistrate judge did not exceed its authority in ruling on this routine discovery motion and the district court did not abuse its discretion by refusing to allow the further discovery.

Yet, Plaintiff argues that additional discovery was necessary to oppose Defendant's summary judgment motion. Fed. R. Civ. P. 56(f) requires that the party seeking to invoke its protection state with specificity how the additional material will rebut the summary judgment motion. *Jensen v. Redevelopment Agency*, 998 F.2d 1550, 1554 (10th Cir. 1993). A party may not invoke Fed. R. Civ.

P. 56(f) by merely asserting that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable. *Id.* Rather, the party must demonstrate precisely how additional discovery will lead to a genuine issue of material fact. *Id.*

The district court properly concluded Plaintiff failed to demonstrate the previous depositions or written discovery were insufficient to allow Plaintiff to respond to Defendant's summary judgment motion. Plaintiff actually served Defendant with interrogatories exceeding the maximum of twenty-five authorized by the discovery order. Defendant nevertheless responded to all of the interrogatories with technical information. In addition, while the discovery order authorized four depositions, Plaintiff elected to take only three. Plaintiff has failed to demonstrate that this discovery was insufficient.[6]

IV.

Finally, Plaintiff argues the district court abused its discretion in denying its motions to stay proceedings to conduct further discovery and for leave to amend its complaint to join ComStock and Townsend as additional defendants. The district court denied the motions, concluding that Plaintiff "offered no compelling reason to permit this futile cause to keep AOL ensnared for even

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[6] Plaintiff also argues that because Defendant voluntarily produced some materials outside the scope of the original discovery order, Defendant waived the limitations and should have been required to produce all of that same class of documents. Plaintiff, however, cites no relevant authority for such a proposition.

one more moment." The district court reasoned that Plaintiff had a full and fair opportunity to conduct discovery into the narrow issue of § 230 immunity and that further opportunity for discovery was unwarranted. We review the district court's denial of a motion to stay proceedings for abuse of discretion. *Scott v. Roberts*, 975 F.2d 1473, 1475 (10th Cir. 1992). We similarly review the district court's decision to deny leave to amend a complaint for abuse of discretion. *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1126 (10th Cir. 1997).

When applying for a stay, a party must demonstrate "a clear case of hardship or inequity" if "even a fair possibility" exists that the stay would damage another party. *Spang-Eng Assocs. v. Weidner*, 771 F.2d 464, 468 (10th Cir. 1985) (quoting *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)). Plaintiff offered no compelling reason requiring a stay to conduct further discovery. Plaintiff served extensive interrogatories on Defendant and utilized only three of the four depositions authorized by the discovery order. Because Plaintiff had ample opportunity to conduct discovery into the narrow issue of § 230 immunity, the district court did not abuse its discretion in denying Plaintiff's motion for a stay of proceedings.

Further, the district court did not abuse its discretion in denying Plaintiff's motion for leave to amend its complaint to add ComStock and Townsend as additional defendants. The district court concluded that Plaintiff's motion to amend its complaint was moot because the court granted Defendant's motion for summary judgment. Plaintiff still had the opportunity to, and in fact did, pursue an action against ComStock and Townsend in a separate proceeding. In March 1999, Plaintiff filed a

separate federal diversity action against ComStock and Townsend, asserting claims for negligence and defamation based on the same alleged stock quotation errors at issue here. That case was dismissed with prejudice pursuant to the parties' stipulation.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN,
AND COMPANY, INC.,

Plaintiff,

No. CIV 97-485LH/LFG

vs.

AMERICA ONLINE, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Mar. 1, 1999)

THIS MATTER comes before the Court on the Defendant's Motion for Summary Judgment (Docket No. 57), filed August 10, 1998; Plaintiff's Cross-Motion for Partial Summary Judgment (Docket No. 67), filed August 28, 1998; Plaintiff's Motion to Stay Proceedings Against Defendant America Online, Inc. (Docket No. 88), filed February 11, 1999; and Plaintiff's Motion to Amend Complaint to Join Additional Defendants (Docket No. 90), filed February 11, 1999. The Court, having considered the pleadings submitted by the parties, the applicable law, and otherwise being fully advised, finds that the Defendant's motion is well taken and will be granted and that the Plaintiff's motions are not well taken and will be denied.

Introduction

Plaintiff, Ben Ezra, Weinstein, and Company (BEW), filed suit seeking damages from Defendant America

Online (AOL) claiming that it suffered injuries when the value of its stock was inaccurately reported on AOL's interactive computer service. The Defendant filed its motion seeking summary judgment asserting that it is immune from suit under federal law and arguing that it cannot be held liable for any errors in the stock information available on its service as that data is provided by third-party "information content providers." *See* 47 U.S.C. § 230. In response, BEW filed a cross-motion for summary judgment opposing the Defendant's motion and seeking partial summary judgment in its favor. The Plaintiff simultaneously filed a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure seeking discovery relating to the origin of the stock data in order to fully respond to the Defendant's motion. The magistrate granted this motion and after the ninety day period for narrowly tailored discovery was complete both parties filed supplemental briefs on the summary judgment motions. Finally, the Plaintiff filed motions to stay these proceedings against AOL and to amend its complaint to include the two additional parties who, AOL asserts, provided the allegedly inaccurate stock information. This remarkable number of unnecessarily voluminous pleadings all address the relatively simple question of whether AOL qualifies for statutory immunity from this defamation and negligence suit as an "interactive computer service." *See* 47 U.S.C. § 230.

Undisputed Material Facts

Although there are numerous facts discussed in the pleadings, the undisputed material facts relevant to the

immunity question establish that AOL provides "an electronic information service (the 'AOL service') that enables millions of subscribers to access various information and information services, including the Internet, through modem connections to computer servers." (Def.'s Mem. Supp. Mot. Summ. J. (hereinafter Def.'s Mem.) ¶ 1.) The Defendant has also established that the stock information available in the "Quotes & Portfolios area of the AOL service, including all of the allegedly erroneous information concerning BEW's stock that is the subject [of this suit], was provided by . . . " two separate and distinct companies known as ComStock and Townsend. (*Id.* ¶ 3.)

It is true, as the Plaintiff repeatedly points out, that there were communications between AOL, ComStock, and Townsend each time errors in the stock data came to AOL's attention and that AOL attempted to help its vendors correct these errors. (*See generally* Pl.'s Mem. Supp. Cross-Mot. Summ. J. and Opp. Def.'s Mot. Summ. J. (hereinafter Pl.'s Mem); Pl.'s Supp. Mem. Opp. Def.'s Mot. Summ. J. (hereinafter Pl.'s Supp. Mem.).) However, such communications and the efforts AOL engaged in to get ComStock and Townsend to correct these errors do not change the fact that AOL never produced or altered any of the allegedly inaccurate information. Plaintiff admits as much by filing its motions to stay the proceedings against AOL and to add ComStock and Townsend as defendants in this action. (*See* Pl.'s Mem. Supp. Mot. Stay at 2 (agreeing that if AOL "is not responsible for the inaccurate" stock information it should not be a party to this action, but seeking additional discovery from ComStock and Townsend to determine AOL's culpability); *but*

see Pl.'s Mot. Stay ¶ 12 (stating that at this time "Plaintiff continues to believe and allege that AOL was responsible for the errors in publishing and reporting of Plaintiff's stock information").)

Moreover, despite its repeated allegations that AOL somehow manipulated the data stream from ComStock, Plaintiff points to no evidence which can be shown to dispute the AOL evidence that clearly establishes that the third-party companies ComStock and Townsend *provided* all of the *information* displayed on the AOL interactive computer service and that AOL never added to the content they produced. (*See e.g.*, Pl.'s Supp. Mem. ¶ 3(a)-(e) (stating that AOL works "closely" with vendors ComStock and Townsend "to get financial data from the source (the stock exchanges) to AOL's customer (the AOL Quotes & Portfolio subscriber)" and noting that the vendors' computers are housed on AOL premises, that AOL loaded Townsend software on the vendors' computers, and that AOL has repeatedly communicated with its vendors about problems as they come to its attention).)

Motions for Summary Judgment

Plaintiff claims that "[f]alse and defamatory information regarding BEW's stock was knowing and repeatedly *published* by AOL" and that "AOL failed to exercise reasonable care in the manipulation, alteration, and change of . . . " the value of BEW's stock. (First Amend. Compl. ¶¶ 36, 44 (emphasis added).) Plaintiff alleges that it was injured as a result and seeks damages and injunctive relief prohibiting AOL from "*publishing* false and erroneous information about BEW." (*Id.* ¶ 51 (emphasis

added).) Defendant asserts in its Motion for Summary Judgment that it is immune from suit pursuant to 47 U.S.C. § 230. Recognizing the uniqueness of the new medium known as the Internet, Congress enacted Section 230, in part, to prevent those computer services which simply transmit information from being held liable for content provided by other entities. *See* 47 U.S.C. § 230(c)(1) (stating that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"). Section 230 creates a distinction between "interactive computer services" – a system which merely transmits information – and "information content providers" – a person or entity which creates or develops, in whole or in part, information transmitted by computer. *See* 47 U.S.C. § 230(e)(2) and (3).

This distinction recognizes that placing traditional publisher or distributor liability for defamatory statements on computer services like Defendant AOL's would "create an impossible burden" requiring the review of literately [sic] hundreds of thousands of postings each day for defamatory content and second by second decisions about whether "to risk liability by allowing the continued publication of that information." *See Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997). To avoid this "impossible burden," Congress established Section 230's broad immunity from suit for "information service providers" when the allegedly defamatory information is created or produced by a third-party.

The Defendant clearly qualifies for this immunity. There is no dispute that AOL is an "interactive computer service" as defined by Section 230. (*See* Pl. Mem. ¶ 2.)

Moreover, despite the Plaintiff's repeated allegations to the contrary, there is no evidence in the record which contradicts the AOL declarant's statements that all of the allegedly defamatory information was created "in whole or in part" by the third-party "information content providers" ComStock and Townsend. (*See* Def.'s Mem. ¶¶ 3, 7 (citing Ex. 1, Shenk Decl. ¶¶ 8, 13-16; Ex. 2, Hsu Decl. ¶¶ 5-6, 8-14). Nor is there any evidence cited by the Plaintiff that AOL provided *any* of the *information* in the ComStock data stream.[1] Applying this immunity to the claims made by the Plaintiff require [sic] their dismissal. *See Zeran*, 129 F.3d at 332 (holding that "Section 230 . . . plainly immunizes computer service providers like AOL from liability for information that originates with third parties").

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[1] There is some discussion that in an effort to correct errors and at the direction of ComStock AOL may have deleted some stock symbols or other information from the database in the "Townsend Computers" housed in AOL facilities. (*See* Pl. Supp. Mem. ¶ 7.) The Court concludes, however, that this act does not turn AOL into an "information content provider." AOL merely made the data unavailable and did not create or develop the information displayed. *See* 47 U.S.C. § 230(e)(3). Nor does AOL's participation in establishing or maintaining its connection to the ComStock data stream or its efforts to get its vendors to correct errors in their service constitute *creating* or *developing* the information content provided by ComStock and Townsend. *See Zeran*, 129 F.3d at 331 (noting "Congress enacted § 230 to remove . . . disincentives to self-regulation . . . [f]earing that the specter of liability would . . . deter service providers from blocking and screening offensive material . . . § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions").

Count I of Plaintiff's First Amended Complaint alleges that AOL defamed BEW by publishing the allegedly inaccurate stock information. (*See* First Amend. Compl. ¶¶ 36-40.) This claim plainly attempts to hold AOL liable for the "publication" of information provided by third party information content providers. Section 230 provides AOL with immunity from this claim and it will be dismissed. *See* 47 U.S.C. § 230(c)(1); *Blumenthal v. Drudge*, 922 F. Supp. 44, 51 (D.D.C. 1998) (holding Congress provided immunity to information service providers "even where [they] have an active, [or] aggressive role in making available content prepared by others"). Similarly, despite Plaintiff's efforts to repackage its injuries in Count II as a negligence claim (*see* First Amend. Compl. ¶¶ 43-46), that claim clearly treats AOL as the publisher of the allegedly inaccurate information and AOL is entitled to Section 230 immunity. *See* 47 U.S.C. § 230(c)(1) (stating that interactive service providers will not be "treated as the publisher or speaker of any information" provided by a third party); *Zeran*, 129 F.3d at 332 (dismissing claims despite Plaintiff's artful efforts to plead negligence, finding that "they are indistinguishable from a garden variety defamation action"). Finally, the Plaintiff seeks injunctive relief from the Defendant's continued *publication* of inaccurate stock information. AOL is again entitled to Section 230 immunity and this claim will be dismissed as well. *See id.* For these reasons, the Defendant's Motion for Summary Judgment will be granted and the Plaintiff's Cross-Motion for Summary Judgment will be denied.

Motions to Stay Proceedings and to Amend the Complaint

Having concluded that AOL is entitled to immunity pursuant to 47 U.S.C. § 230 and that the Defendant's Motion for Summary Judgment should be granted, the Court finds that Plaintiff's eleventh hour motions to stay proceedings against AOL and to amend its First Amended Complaint to include ComStock and Townsend as defendants are unnecessary.[2] Plaintiff has offered no compelling reason to permit this futile cause to keep AOL ensnared for even one more moment. Nor has the Plaintiff pointed to any compelling reason which would require the Court to permit amendment of its complaint to name two entirely distinct defendants for actions separate from the AOL conduct alleged here. Therefore, the Court will deny the motions to stay and to amend as moot. However, the Plaintiff is free to file a separate suit against any other entity it believes is responsible for its alleged injuries, assuming that entity is not entitled to Section 230 immunity.

IT IS, THEREFORE, ORDERED that the Defendant's Motion for Summary Judgment (Docket No. 57), filed August 10, 1998, is **granted.**

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[2] As the Defendant points out, there is no reason why Plaintiff could not have sought the discovery it now requests from ComStock and Townsend. (*See* Def. Joint Opp. Pl.'s Mot. Amend and Stay at 10.) The Court finds that the Plaintiff has had a full and fair opportunity for discovery into this narrow issue and that a further opportunity for discovery is unwarranted.

IT IS FURTHER ORDERED that Plaintiff's Cross-Motion for Partial Summary Judgment (Docket No. 67), filed August 28, 1998, is **denied.**

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Proceedings Against Defendant America Online, Inc. (Docket No. 88), filed February 11, 1999, and Plaintiff's Motion to Amend Complaint to Join Additional Defendants (Docket No. 90), filed February 11, 1999, are **denied as moot.**

IT IS FURTHER ORDERED that all of the Plaintiff's claims in its First Amended Complaint are **dismissed with prejudice** as against Defendant AOL and are otherwise **dismissed without prejudice.**

IT IS FINALLY ORDERED that the hearing set in this matter for Wednesday March 3, 1999, is **vacated** and will not be rescheduled.

/s/ LeRoy Hansen
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN, AND COMPANY, INC.,

Plaintiff,

No. CIV 97-485 LH/LFG

vs.

AMERICA ONLINE, INC.,

Defendant.

FINAL JUDGMENT

(Filed Mar. 1, 1999)

THIS MATTER came before the Honorable C. LeRoy Hansen, United States District Judge on the Defendant's Motion for Summary Judgment (Docket No. 57), filed August 10, 1998. The Court, having considered the pleadings submitted by the parties, the applicable law, and otherwise being fully advised, found that the Defendant's Motion for Summary Judgment was well taken. The Court enters a Memorandum Opinion and Order contemporaneously with this Final Judgment, granting Defendant's motion and dismissing all counts of Plaintiff's Complaint. This Final Judgment adjudicates all existing claims and liabilities of the parties and, therefore, this case is **DISMISSED with prejudice** as to Defendant America Online, Inc. and is otherwise **DISMISSED without prejudice.**

/s/ LeRoy Hansen
UNITED STATES DISTRICT JUDGE